

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN KEITH GATHING,

Defendant-Appellant.

UNPUBLISHED

May 13, 2003

No. 232980

Berrien Circuit Court

LC No. 90-004240-FC

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Following a jury trial in March 1991, defendant was convicted of first-degree, premeditated murder, MCL 750.316; conspiracy to commit first-degree murder, MCL 750.157a; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the murder and conspiracy convictions, consecutive to two years' imprisonment for felony firearm. He did not appeal his convictions. On February 13, 2002, defendant's motion for relief from judgment was denied by the lower court.¹ Defendant appeals by leave granted from the order denying his motion. We affirm.

I

Defendant challenges several issues that were raised below in his motion for relief from judgment. Generally, we review a lower court's ruling on a motion for relief from judgment for an abuse of discretion. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001). MCR 6.508(D)(3) provides, in relevant part:

¹ Several months after defendant was sentenced, he requested the appointment of appellate counsel. His untimely request was denied. Defendant subsequently appealed, in propria persona, to this Court in Docket No. 144930, whereupon we issued a peremptory order directing the circuit court to appoint appellate counsel for defendant. Appointed appellate counsel failed to take the appropriate steps to pursue an appeal. In 1995, new appellate counsel was appointed. She, too, failed to properly pursue appellate relief on defendant's behalf. In March 2000, defendant's present counsel was appointed. She subsequently filed a motion for relief from judgment, which the trial court denied.

(D) The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, “actual prejudice” means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal.

If actual prejudice is not established, it is unnecessary to address the question of good cause. *People v Jackson*, 465 Mich 390, 405; 633 NW2d 825 (2001), mod 465 Mich 1209 (2001).

A

We must first determine whether the lower court abused its discretion by denying defendant’s motion for relief from judgment with respect to defendant’s claim that the trial court improperly refused to suppress the statements defendant made to Detective Robert Boyce. Defendant argues that his waiver of his Fifth Amendment rights was not voluntary, but rather was the product of police coercion. In resolving this issue, we must review the record and make an independent determination of voluntariness. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). Deference is given, however, to the trial court’s findings, which will not be reversed unless they are clearly erroneous. *Id.*

A claim that defendant’s *Miranda*² rights were violated focuses on the voluntariness of the defendant’s waiver of his right against self-incrimination. *People v Wells*, 238 Mich App 383, 387; 605 NW2d 374 (1999). “The voluntariness of a waiver is determined by examining the police conduct involved.” *Id.* Similarly, in *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000), our Supreme Court noted that “whether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion.”

At an evidentiary hearing, Boyce testified about his interview with defendant. During the interview, Boyce encouraged defendant to be truthful. Boyce informed defendant that the victim had died and that the only way to determine who fired the fatal shot was for defendant to be truthful. Boyce also indicated that, if defendant told the truth about which weapon each codefendant possessed, a determination could be made about who fired the fatal shot. Defendant contends that, based on Boyce’s statements, he believed his truthfulness would result in leniency,

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

i.e., if he was truthful, he would not be subject to a first-degree murder charge. Defendant concludes that, because he was misled by Boyce, his statements should have been suppressed. We disagree. There is no evidence that police coercion caused defendant to waive his rights and make statements to Boyce. Boyce never promised defendant anything nor did he suggest that defendant's truthfulness would lead to leniency. In fact, there is no evidence that Boyce ever discussed charges with defendant. Because the record does not suggest that defendant was intimidated, deceived, or otherwise coerced, we reject defendant's contention that his waiver was not voluntary. *Daoud, supra* at 635; *Wells, supra* at 387.

We further conclude, apart from the independent issue of defendant's waiver of *Miranda* rights, that his statement was voluntarily given. In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), our Supreme Court opined as follows:

In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

In this case, defendant was a nineteen-year-old, high school graduate. By his own admission, he had previous contacts with the criminal system. Boyce questioned defendant for less than one-half hour, and defendant was in a holding cell for no more than two hours before the interview. Defendant was advised of his *Miranda* rights and appeared to understand them. There was no evidence that he was injured or under the influence of drugs or alcohol, nor was he deprived of food, sleep, or medical attention. Additionally, he was not abused or threatened. Moreover, there is no evidence of coercion. Thus, the totality of the circumstances supports a determination that defendant's statements were voluntarily given. *Id.*

Because there was no basis to suppress defendant's statements, the trial court properly denied defendant's motion to suppress. For that reason, defendant cannot establish actual prejudice, as necessary to warrant relief from judgment. MCR 6.508(D)(3)(b). Therefore, the lower court did not abuse its discretion by denying defendant's motion for relief from judgment with respect to this issue. *Ulman, supra* at 508.

B

Next, we consider whether the lower court abused its discretion by denying defendant's motion for relief from judgment with respect to his claim that prosecutorial misconduct affected the outcome of defendant's case. Generally, we review claims of prosecutorial misconduct "case by case, examining the remarks in context, to determine whether the defendant received a fair

and impartial trial.” *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). We note that defendant’s trial counsel did not object to the challenged conduct at trial. “Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error.” *Id.* No error requiring reversal will be found if a timely curative instruction could have cured the prejudicial effect of the prosecutor’s conduct. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), quoting *People v Schuette*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Here, defendant challenges the prosecutor’s statement that people should be able to walk the streets of Benton Harbor without worrying about getting assaulted. An improper civic duty argument appeals to the jurors’ sense of civic duty to convict a defendant or improperly plays upon their general fears or prejudices. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Prosecutors should not resort to civic duty arguments. *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999), quoting *Bahoda*, *supra* at 282. In this case, the prosecutor made an improper civic duty argument to the jury. However, the comment was brief and isolated, and followed by the prosecutor’s reminder to the jury that it needed to sift through the evidence to decide the case. Thus, we are not persuaded that a timely curative instruction would not have cured the prejudicial effect of the statement. *Watson*, *supra* at 586. Additionally, the jury was instructed that the case needed to be decided solely on the basis of the evidence, and that the lawyers’ arguments were not evidence.

Under the circumstances, the prosecutor’s argument would not warrant reversal; thus, defendant cannot demonstrate the actual prejudice necessary to warrant relief from judgment. MCR 6.508(D)(3)(b). Therefore, the lower court did not abuse its discretion by denying defendant’s motion for relief from judgment with respect to this issue. *Ulman*, *supra* at 508.

C

We next consider whether the trial court abused its discretion by denying defendant’s motion for relief from judgment with regard to the sufficiency of the evidence. Defendant contends that the evidence was insufficient to support his convictions of first-degree murder and conspiracy to commit first-degree murder. A challenge to the sufficiency of the evidence requires us to determine “whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt.” *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Circumstantial evidence, and reasonable inferences arising from it, may be sufficient to prove the elements of a crime. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

In *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998), we opined as follows:

In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. [Citations omitted.]

In this case, the prosecutor pursued first-degree murder charges against defendant as an aider and abettor, MCL 767.39. A conviction of aiding and abetting requires proof that: (1) the underlying crime was committed by defendant or another person, (2) the defendant performed acts or gave encouragement that aided and assisted the other person in committing the underlying crime, and (3) the defendant either intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999).

Here, viewed in a light most favorable to the prosecution, the evidence was sufficient to establish that first-degree murder was committed by one of the codefendants, that defendant assisted and encouraged the codefendant, and that defendant intended the commission of first-degree murder. The trial testimony revealed that members of the Old School Dogs, including defendant, argued with Decorey Harris (“Decorey”), a member of Black Soul 440. Defendant made a statement threatening Decorey’s life. Later, there was an altercation near the Britain Street Bridge, and someone in Decorey’s group discharged a shotgun toward Mark Harris (“Harris”), who was with defendant, Leonard Williams, and Tony Horne. Defendant and his friends subsequently left the area together. Harris indicated that they were going to get their “shit.” As they walked to Horne’s car, they mumbled to each other. They then went to the Highland Projects where Harris obtained handguns. He kept one gun and gave one each to defendant and Williams. The trio then went looking for Decorey. Upon seeing a large group of people walking down Ogden Street, they emerged from behind a house. Defendant believed Decorey was in the other group. Harris made a statement about shooting and, immediately, shots were fired from the area where Harris was standing with defendant and Williams. One witness, who saw three men but could not identify all of them, testified that all three were pointing at the large group. Defendant admitted to Boyce that he shot at the crowd. No one from the large group shot at defendant, Harris, or Williams. The victim was killed by a .22 caliber handgun. Williams had a .22 caliber handgun. After the shooting, defendant, Harris and Williams went to the nearby home of Harris’s girlfriend, where Harris hid the weapons.

The above evidence supports an inference that defendant, Williams, and Harris possessed the requisite intent to kill and that an act of first-degree murder was committed. The three men left the area of the Britain Street Bridge in anger, obtained weapons, looked for Decorey, and shot at the crowd where they believed Decorey was. This evidence was sufficient to support an inference that defendant and the others premeditated or deliberated killing Decorey, and anyone else with him, who might be struck by a bullet. This evidence was also sufficient to establish that Williams fired the fatal shot. In addition, the evidence indicated that defendant assisted and encouraged the commission of the crime by joining with Harris and Williams in obtaining a weapon, accompanying them in search of Decorey, and shooting at the crowd along with both Harris and Williams. Finally, the circumstances supported an inference that defendant intended the commission of the crime. Defendant told Carter, a member of Black Soul 440, that his “leader got to die.” Defendant obtained a weapon and actively searched for Decorey. Defendant later shot at the crowd where he believed Decorey was. He then left the scene of the shooting with the others and went to hide the guns. Consequently, viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant’s conviction of first-degree murder as an aider and abettor.

In addition, the evidence was also sufficient to support defendant's conviction of conspiracy to commit first-degree murder. In *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991), we opined as follows:

A conspiracy is mutual agreement or understanding, express or implied, between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means. Being a specific-intent crime, conspiracy requires both the intent to combine with others and the intent to accomplish the illegal objective. The essence of a conspiracy is the agreement itself. Nevertheless, direct proof of agreement is not required, nor is proof of a formal agreement necessary. It is sufficient that the circumstances, acts, and conduct of the parties establish an agreement. A conspiracy may be proven by circumstantial evidence or may be based on inference. The crime of conspiracy is complete upon formation of the agreement. No overt act in furtherance of the conspiracy is necessary. [Citations omitted.]

While there was no direct proof of an agreement in this case, the acts, circumstances and conduct of defendant, Harris, and Williams support the existence of an implied agreement beyond a reasonable doubt. Indeed, viewed in a light most favorable to the prosecution, the aforementioned evidence was sufficient to enable a reasonable jury to find the essential elements of conspiracy to commit first-degree murder beyond a reasonable doubt. *Nowack, supra* at 399.

Because the evidence was sufficient to support defendant's convictions of first-degree murder and conspiracy to commit first-degree murder, defendant cannot demonstrate the actual prejudice necessary to support his motion for relief from judgment. MCR 6.508(D)(3)(b). The lower court did not abuse its discretion when it denied the motion for relief from judgment. *Ulman, supra* at 508.

II

Defendant also challenges the trial court's decision to deny his motion to adjourn, which was made approximately one week before trial. Generally, adjournment of a criminal trial is permitted only for "good cause." MCL 768.2. In reviewing a trial court's decision to deny a defendant's motion for a continuance, we consider whether the defendant asserted a constitutional right, whether he had a legitimate reason for asserting that right, whether he was negligent in requesting the adjournment, and whether he requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). In order to prevail on appeal, defendant must also demonstrate prejudice resulting from a trial court's denial of a motion to adjourn. *Id.* We review a trial court's denial of a motion to adjourn for an abuse of discretion. *Id.*

In this case, defendant's counsel did not articulate a legitimate reason for requesting an adjournment. She argued that the case was complex and that she needed additional time to prepare. The trial court found, however, that an adjournment was not necessary because the case was not complex. We are not persuaded that the court erred in this regard. Trial counsel had all of the necessary information six days before trial began. There was no specialized defense that

needed preparation, and the police report was comprehensive. Defendant never claimed that additional investigation was necessary. Further, trial counsel met with defendant's prior counsel to discuss the case. Under the circumstances, the trial court did not abuse its discretion in denying the request for an adjournment.³ *Lawton, supra* at 348.

III

Finally, defendant argues that the trial court abused its discretion by denying his motion for change of venue. At the pretrial hearing on defendant's motion to change venue, the trial court summarized the various newspaper articles presented by defendant in support of his motion. The trial court found that the news reporting was factual and not inflammatory. It denied the motion. In doing so, however, it indicated that the denial of the motion was without prejudice and could be renewed if jury selection proved difficult because of pretrial publicity. Nothing in the record presented to us suggests that defendant renewed his motion or expressed dissatisfaction with the jury.⁴ Thus, the issue is waived. *People v Clark*, 243 Mich App 424, 426; 622 NW2d 344 (2000).

Affirmed.

/s/ Henry William Saad

/s/ Patrick M. Meter

/s/ Donald S. Owens

³ We also note that this issue was not raised in defendant's motion for relief of judgment. Regardless, defendant has not demonstrated prejudice resulting from the trial court's decision to deny the adjournment, as necessary to prevail on such a motion. *Ulman, supra* at 508.

⁴ We note that defendant failed to order a transcript of the jury voir dire and failed to otherwise present evidence supporting his claim that he renewed the motion or expressed dissatisfaction with his jury after jury selection.